I would accordingly dismiss this appeal with costs.

Barakbah L.P. and **Azmi C.J. (Malaya)** concurred.

Appeal dismissed.

Solicitors: *Jag-Jit Singh; Lim Cheng Ean & Co.*

ANJALAI AMMAL & ANOR. v. ABDUL KAREEM

[O.C.J. (Chang Min Tat J.) March 2, 1968]
[Penang — Civil Suit No. 317 of 1965]

Land Law — Adverse Possession — Tacking — Privity of contract — Possession of successive trespassers.

The plaintiffs, as administrators of the estate of one *A.N.K.*, claimed for a declaration that they were as such administrators the owners of two pieces of land situate in Penang and for possession from the defendant. The defence to the action was long possession.

A.N.K. acquired the fee simple of the lands in question by purchase for valuable consideration in 1929. He died in 1936. The plaintiffs applied for the grant letters of administration in 1950, but the grant was not extracted until 1965. A short while after acquiring the legal capacity to sue as administrators, they brought this action against the defendant in possession.

The defendant adduced evidence that he married in 1940 one *K* who was living on an adjoining lot to the lands in question. *K*'s evidence was that when she went to live on the adjoining lot in 1939, the lands in question were vacant and she went into occupation and possession shortly afterwards and continued to remain in such possession of the lands. On the evidence the court found that the defendant entered into possession *ab initio* by himself and by his predecessors *qua* trespasser.

Held, dismissing the claim: in this case, on the principle of tacking and by proving privity of contract between him and his predecessors in possession so as to inure to his benefits the entire period of the adverse possession the defendant had established at the institution of the action an unassailable possessory title to the lands.

Cases referred to:—

(1) *Haywood & Anor.* v. *Chaloner* [1967] 3 W.L.R. 1068.

(2) *Chin Wah Kiat* v. *Theynappa Ltd.* [1955] M.L.J. 198.

(3) *Seddon* v. *Smith* (1877), 36 L.T. 168.

(4) *Asher* v. *Whitlock* (1865), 1 Q.B.D. 1.

(5) *Sundar* v. *Parbati* (1899), I.L.R. 12 All. 51; 33 I.C. 371.

(6) *Trustees Executors Agencies Co. Ltd.* v. *Short* (1883), 13 App. Cas. 793.

CIVIL SUIT.

S. Thillaimuthu for the plaintiffs.

Ong Huck Lim for the defendant.

Cur. Adv. Vult.

Chang Min Tat J.: In this action the plaintiffs, suing as the administrators of the estate of A. N. Kathiravaloo, deceased, claim for a declaration that they are as such administrators the owners in fee simple of two pieces of land comprised in Grant No. 168 and known as lots 447(3) and 447(4) Town Subdivision 9 in the North East District of Penang and containing the respective areas of 13.24 poles and 14.14 poles (hereinafter referred to as the lands) and for possession from the defendant. The defence to the action is long possession.

The deceased acquired the fee simple of the lands by purchase for valuable consideration on the 8th August, 1929. On the 30th December in the same year, the deceased mortgaged the lands to one A.R.M.A.R. Muthu Karupan Chettiar. It has been submitted that the mortgage is still outstanding as there is no record of any reconveyance from the mortgagee to the mortgagor or his nominee or nominees, but in the absence of any evidence of any revival of the period of limitation and on the averments in the statement of claim, it would appear that the mortgage is now barred by limitation. In any event, it is not suggested that the mortgage is pertinent to the issue.

The deceased died intestate on the 11th August, 1936. Some time in 1950, the plaintiffs in this action applied for the grant of letters of administration in the estate of the deceased. The grant was made to them on the 23rd May, 1950, but for some reason or other, the grant was not extracted until the 14th September, 1965, some 15 years after. In the meantime, within a year of the deceased's demise, the 1st plaintiff, then a young widow of about 16 years, had married the 2nd plaintiff. As explained by the 1st plaintiff, she took 15 years to extract the grant because she was moving about and not resident in any one place.

A little more than a month after acquiring the legal capacity to sue as administrators, armed with a grant duly extracted, the plaintiffs caused to be issued the writ of summons in this action. It is obvious that the extraction was made for the primary purpose of bringing this action against the defendant in possession.

On an adjoining lot, known as Lot 447(5) T.S. 9 North East District, Penang, stood a house No. 166-E East Jelutong, Penang, and it is in evidence, which is uncontroverted and which I accept, that the mother of Khatijah binti Che Mat Ibrahim (D.W.2) first went with her to live there in 1939, initially as a tenant of the landowner and subsequently, after purchase, in her own right. There would appear to have been subsequent transactions of the fee simple of this adjoining lot in respect of which no clear evidence was adduced, except that the defendant acquired the fee simple in possession on the 7th October, 1958, but the fact remains that D.W.2 is still at the time of the hearing resident in this house.

The statement of claim, after citing the history of the plaintiffs' ownership of the land, goes on to refer to a deed poll dated 30th May, 1955, whereby D.W.2 purported to convey the lands to one Ooi Boon Kay, who, in turn, on the 10th October, 1958, i.e. 3 days after defendant had acquired the adjacent lot, purported to convey the lands to him. On this bare pleading, without any averment of any contractual relationship between the parties, the plaintiffs prayed for the declaration of ownership and for possession.

In evidence, the plaintiffs would have the court believe that the defendant was, to their knowledge, the lessee of the deceased in respect of the trees on the land at the rate of $10 per half year and that after the death of the deceased, they had personally gone to collect the rents from the defendant, once in 1938 and again in 1941, on each of which occasions they collected $10. A demand for rents was made personally in 1960 but no payment was then made. No averments of the lease or of due determination thereof were made in their statement of claim, and no prayer was indeed made for recovery of such rents as were not statute-barred.

In reply, the defendant adduced documentary evidence that he married D.W.2 on the 13th June, 1940, and that he went to live with D.W.2 in the house on the adjoining lot only after his marriage.

In the face of such evidence, I find myself unable to believe the plaintiffs with regard to the purported lease or the demands for rents in 1938, 1941 and again in 1960 or any meeting with D.W.2 or the defendant at any time before action was commenced. It is clear, therefore, that the defendant, if he did enter into possession of the lands, did so not as tenant and remained over. If the defendant had been a tenant of the deceased, then 12 and more years having lapsed from the last payment of rents to the deceased who, it must be remembered, died in 1936 till the institution of the action, the defendant would have acquired an unassailable title. (See *Haywood & Anor.* v. *Chaloner* [1]). I find that the defendant entered into possession *ab initio* by himself and by his predecessors *qua* trespasser. It remains, therefore, to decide whether the defendant's possession was that adverse and for a sufficient period of time as to establish in him an unassailable possessory title to the lands in dispute.

D.W.2's evidence is to the fact that when she went to live in the house on the adjoining lot, the lands in dispute were vacant and she went into occupation and possession shortly afterwards and continued to remain in such possession of the lands. On the 30th May, 1955, she made a statutory declaration affirming that she had been in peaceful occupation of the lands for upwards of 15 years, had caused the lands to be cleared of undergrowth regularly and be planted with coconut palms, rambutan and durian trees, and had enjoyed the fruits from the palms and further had caused to be erected on the above lots a shed which she used as a garage and a store. She further affirmed that during this period she had been in uninterrupted and undisputed possession.

Two points arose from this affidavit, the first a question of fact, and the other a matter of law. The plaintiffs testified that there was, at the time of the death of the deceased, a shed on the land used as a store for gardening implements and for drying copra and that this was the shed used by D.W.2 until its demolition and replacement on a slightly different site by another and bigger shed. In view of their general unreliability, I reject their evidence. I also reject the evidence of their one witness, P.W.4, Suppiah Pathar s/o Ratna Pathar, as I cannot accept his assertion that twice in the lifetime of the deceased, he went on the lands with the deceased, in about 1933 and 1934. Human memory, in my experience, is not that infallible that it can extend over such a long period of time and recall incidents which are, by their nature, merely incidental and not such as to be impinged on it. I prefer the evidence, therefore, of D.W.2 that the lands were vacant when she took possession of them and that she built the shed on the lands, and planted the fruit trees thereon.

As a matter of law, it was argued that D.W.2's claim that from 1939 to the 30th May, 1955, she had been in possession for more than 15 years was factually correct, but in law not sound since the moratorium period from the 1st January, 1942, to 30th September, 1949, was excluded. The case cited of *Chin Wah Kiat* v. *Theynappa Ltd.*,[2] which is a Singapore case applying the Limitation (Amendment) Ordinance No. 33 of 1949 of Singapore, is obviously no authority. However, there is statutory provision for the exclusion of the moratorium period. It is found in the Limitation (Enemy Occupation) Ordinance, 1946, which though repealed by the Federal Statute Law Revision (Former Malayan Union) Act No. 67 of 1965 is preserved in section 36 of the Limitation Ordinance No. 4 of 1953. This submission on behalf of the plaintiffs is, therefore, substantially correct.

It is also urged on me that the occupation of D.W.2 by its nature as testified to in her affidavit claiming title by long possession and in her evidence was not adequate in continuity, in publicity and in extent of area as to be possession adverse to the deceased and after his death, to his administrators. The clearing of the lands, the growing of fruit trees and the erection of a shed coupled with the absence of any complete

fencing to indicate exclusive possession and the exclusion of others were stressed. But it is decided law that the possession of a stranger to be inconsistent with that of the real owner need not be such as necessarily to exclude third parties e.g. it need not be accompanied by the erection of fences. In the words of Cockburn C.J. in *Seddon* v. *Smith* [3] :—

"To my mind, it makes no difference whether there be enclosure or not. Enclosure is the strongest possible evidence of adverse possession but it is not indispensable. Take the cases put by my brother Brett of adjacent lands unhedged; in such a case encroachment and user, would, in my opinion, without doubt amount to adverse possession."

Earlier on the learned Chief Justice said:—

"I care not what he grew, he used it in all respects as if it were his own; and such a user, I am of opinion, would at least give a title, because the lord of the manor had many ways of putting an end to it had he chosen to do so, instead of standing by, as he did, doing nothing."

It is, as I conceive it, settled that if the land is not such as to admit of residence, such use and occupation of it as from its nature it is susceptible of with claim of ownership will, in law, amount to actual possession. D.W.2's evidence of planting the fences round the lands though not completely exclusionary and long user for growing her fruit trees and other crops and as a site for her garage, which I accept as facts, treating the lands at all times as if they were her own is, in my opinion, evidence of a continuous dominion and ownership in the lands according to the purpose for which the lands are adapted and sufficient in law to establish her adverse possession for the period available at law to her, that is, from 1939 to 30th May, 1955, excluding the moratorium period 1st January, 1942, to 30th September, 1949.

I further accept as facts her evidence that she paid off the arrears of quit rents on entering into possession and the quit rents due thereafter. There is evidence that for some years (from 1942-1946, and 1948-1950 only) during this period of her possession, the plaintiffs also paid the quit rents. Apparently it is possible for quit rents to be paid by parties other than the registered owner of the land and for several payments to be made in respect of any one year. In my opinion, however, the payments by the plaintiffs of the quit rents without actual recovery or re-entry into possession are not *per se* sufficient to prevent time from running against them. On the other hand, I find in such payments by D.W.2 and in the facts of her occupation and possession, evidence of her intention to acquire dominion by overt acts of ownership.

If I am wrong in my opinion with regard to the payments of the quit rents by the plaintiffs, the issue before me is still whether at the institution of the action on 18th October, 1965, the defendant had established a title to the lands by adverse possession for the prescribed period of 12 years. On the plaintiffs' own admission that after 1950 they did not pay any quit rents, it is at once apparent that nothing turns on the question of such payments.

It is settled law that possession connected as of right can be tacked. Where a trespasser has gone into adverse possession, he has even before the expiry of the full prescribed period of 12 years, as long as he remains in possession, a transferable and a transmissible and inheritable interest in the property. It is, of course, an interest which is liable at any moment to be defeated by the entry of the rightful owner, but in the absence of such an event he can transfer by contract or bequeath by will his interest therein, and if he does so and the transferee or devisee enters into possession either by himself or by his agents or servants, and holds till the expiration of the statutory period, such transferee or devisee has then as good a right to possession as if he himself had occupied for the whole period. (See *Asher* v. *Whitlock,* [4] approved by the Privy Council in *Sundar* v. *Parbati* [5]). The possession of successive trespassers, whether the claim of title is by privity of contract or by operation of law can, therefore, be so continuously adverse as to inure to the benefit of the last occupant. Conversely, where a trespasser abandoned possession and is succeeded by another trespasser with whom there is no privity of contract or whose succession is not by operation of law, there is no continuity of adverse possession, and on the abandonment of possession by the first trespasser, the property immediately vests in the rightful owner. (See *Trustees Executors Agencies Co. Ltd.* v. *Short* [6]).

It is in evidence that on 30th May, 1955, by deed poll and for valuable consideration, D.W.2 transferred her interest in the lands to Ooi Boon Kay. If at this time she could not show a possessory title for the full statutory period, she nevertheless had an interest which she could transfer. It is also in evidence, which I accept, that thereafter she remained in possession as the agent of Ooi Boon Kay and continued to do so until the transfer for valuable consideration by Ooi Boon Kay to the defendant on 10th October, 1958. Again it matters not that Ooi Boon Kay had at this time no indefeasible title. Thereafter the defendant entered into occupation and possession both by himself and his wife and he continued in such possession until the full 12 years prescribed by statute had expired. In my view, *Trustees Executors Agencies Co. Ltd.* v. *Short, supra,* which has been relied upon by the plaintiffs, does not apply. In this case, on the principle of tacking and by proving privity of contract between him and his predecessors in possession so as to inure to his benefit the entire period of the adverse possession the defendant

had established at the institution of the action an unassailable possessory title to the lands.

The result is unfortunate for the plaintiffs. I could only repeat the words of Cockburn C.J. cited above. The claim is dismissed with costs.

Claim dismissed.

Solicitors: *S. Thillaimuthu; Ong Huck Lim & Co.*

RODRIGUES v. ROBERT WEE & CO.

[O.C.J. (Winslow J.) March 29, 1968]
[Singapore — Suit No. 504 of 1966]

Contract — Breach of — Sharebrokers — Wrongful delivery of shares — Assessment of damages.

The plaintiffs bought 2,000 shares from Alex Goei a stockbroker sometime in 1962. The shares were to be delivered to him in May 1962 but they were never so delivered — in fact they were wrongfully sold at a lower price in June 1962. From the evidence it was clear that both Alex Goei and the plaintiff were to blame for the delay which resulted in the plaintiff discovering in 1964 that his shares were sold in 1962. Subsequently the defendants took over the business of Alex Goei and as a result of this taking over the defendants were not in a position to know how their business transactions stood *vis-a-vis* their clients. In an action for damages for breach of contract,

Held: in view of the inconclusive nature of the authorities and in the circumstances of the case damages for breach should be arrived at a figure roughly about half way between the contract price and the highest peak before the action i.e. at 60 cents per share.

Cases referred to:—

(1) *Shaw* v. *Holland* (1846), 15 M. & W. 136.

(2) *Sri Lanka Omnibus Co.* v. *Perera* [1952] A.C. 76.

(3) *Sachs* v. *Miklos* [1948] 2 K.B. 22.

CIVIL SUIT.

K. E. Hilborne for the plaintiff.

A. S. K. Wee for the defendants.

Cur. Adv. Vult.

Winslow J.: It is well-recognised that the object in assessing damages for breach of contract is to arrive, as nearly as possible, at the real loss sustained by a plaintiff. The difficulty arises, however, when, as in this case, there has been a wrongful delivery to another person, in addition to mere non-delivery on the due date, *i.e.*, one month after the contract date.

The plaintiff only came to know, in November 1964, that the shares he had bought and which were to be delivered in May 1962 had been wrongfully sold, *albeit* at a lower price, in June 1962 and complaint is made, not entirely without justification, that he has himself been tardy, and that he should not have inflamed damages but tried to mitigate them by being more alert in the matter. As against that, the accounts kept by the defendants' predecessors were in a mess and I have already found that they did not inform him that the shares were ready for delivery or even send him a debit note when they should have done so. The plaintiff, on the other hand, seemed to show little interest in this particular contract note, which he held. As he was speculating heavily in shares, at that time, he probably forgot all about them and placed the onus entirely on the defendants to remind him.

In my opinion, both sides were to blame for the delay which resulted in the plaintiff's discovering only in 1964 that his shares had been sold to someone else. Moreover, Alex Goei also contributed to the delay by his own conduct. Subsequently the defendants who took over the business were placed in the unhappy position of not knowing exactly how their business transactions stood *vis-a-vis* their clients because Alex Goei himself left the firm in 1962 soon after the wrongful sale of these shares to Sena & Co., having created the mess which he left behind for them to sort out.

In assessing damages I have to bear in mind that although the plaintiff has not yet paid for these shares and that they had gone down in price by the time the delivery date arrived, he had been debited with the contract price in June 1962.

If this had been a simple case of non-delivery, the case of *Shaw* v. *Holland* (1) would probably apply. There it was held that, by analogy to an action for the non-delivery of goods, the normal measure of damages would be the difference between the contract price and the market price at the time of delivery. It has been said that if the market value falls before the due date to a level lower than the contract price the plaintiff would normally be wise not to pursue his remedies, as a complete answer to him would be that, as he has the money in his own hands, he would suffer no loss because he could buy the shares elsewhere if not indeed at a lower price than that indicated in his contract. That may well be so in the case of an isolated transaction where the plaintiff has no account at all with the seller.

As against this principle, there is another line of cases of which *Sri Lanka Omnibus Co.* v. *Perera* (2) is an example. But that, of course, was a case in which, on its facts, specific performance was decreed and the buyer was held to be entitled to recover the dividends between the delivery date and the date on which the shares were actually allotted to him, together with interest. In the present case specific performance could not be decreed because the particular shares had been sold.

Where however the market value has fluctuated both up and down between breach, knowledge and judgment, there is little clear authority.